

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Doc. No. 76-1216

Docket No. 76-1216

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellees

-vs-

JOSEPH CAMPANA,

Defendant-Appellant

BRIEF ON APPEAL

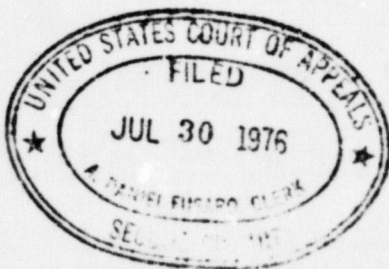


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ISSUES

POINT I:

Is the Order denying Defendant's motion to dismiss the Indictment as being in violation of the November 13th, 1974 order of the Court precluding the government in areas of its proof and requiring compliance with prior orders, in error?

POINT II:

Was the Defendant denied his right to a speedy trial pursuant to Rule 48 b. of the Federal Rules of Criminal Procedure?

POINT III:

Did the admission of the testimony of James Gambacorta and Robert Fochopin, over the objection of the Defendant, as to numerous unrelated crimes and conspiracies create a prejudicial spill-over depriving the Defendant of a fair trial?

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STATEMENT OF THE CASE

On September 5th, 1973, the Defendant herein, under Indictment No. 1973-300, was charged with Conspiracy to Commit Offenses against the United States by making \$80,000.00 worth of counterfeit obligations of the United States with the intent to defraud and by transferring and delivering certain counterfeit obligations of the United States with the intent that the same be treated as true and genuine in violation of Title 18 U.S.C, Section 371, and with a violation of Title 18, Section 473, in that he did willfully and knowingly receive \$80,000.00 in false and counterfeit obligations of the United States with the intent that the same be used as true and genuine Federal Reserve Notes. On November 13th, 1974, the United States' Attorney, after declaring the government ready for trial and the trial ordered to proceed, moved to amend his Bill of Particulars to change the time period within which the possession of counterfeit currency occurred in violation of Title 18 U.S.C, Section 473. The Court denied the motion and precluded the government from proving dates at a variance from those supplied in the Bill of Particulars, whereupon the United States' Attorney's request for a continuance was granted. The Court further ordered the government to furnish Particulars in accordance with prior rulings or seek clarifications, if necessary. On November 14th, 1974, a superceding Indictment (No. 1974-303) was filed with the Clerk of the Western District Court. This Indictment contained the same allegations as Indictment No. 1973-300 except that the time of the alleged offense in Count 2 was changed to include that time period which the government was

precluded from amending its Bill of Particulars to include on November 13th, 1974. By Memorandum Decision filed August 8th, 1976, the Court denied Defendant's motion to dismiss Indictment No. 1974-303 as being in contravention of the Court's Order of November 13th, 1974 under Indictment No. 1973-300. Indictment No. 1974-303 proceeded to trial on March 22nd, 1976 resulting in a conviction under Count 1 and a hung jury as to Count 2 of the Indictment. A Motion for Judgment of Acquittal was granted as to Count 2 of the Indictment and denied as to Count 1 on April 29th, 1976.

Edward Barczak was the government's main witness, having been named as an unindicted co-conspirator. He testified that he first met the Defendant in December of 1970 (Transcript, p. 18) and thereafter saw him frequently for approximately two years (p. 19). Mr. Barczak testified that he and the Defendant first discussed the production of counterfeit \$10.00 bills around March of 1971 and approximately \$80,000.00 was produced (p. 21). This was done and the money placed in a box by Mr. Barczak around April 4th, 1972 (p. 22). The \$10.00 bills used to produce the negatives were supplied by the Defendant (p. 26) who was to sell the counterfeit \$10.00 bills in bulk and remit one-third of the proceeds to Mr. Barczak (p. 28). The Defendant supplied the paper to Mr. Barczak around February or March of 1972 (p. 30) as well as periodically supplying technical information regarding the printing of the counterfeit bills (p. 32). The Defendant, around April 4th, 1972, removed the \$80,000.00 in \$10.00 bills from Mr. Barczak's shop during a weekend when Barczak was

not present.

Mr. Barczak was shown government Exhibit No. 1 and identified it as consisting of counterfeit \$10.00 bills, some of which he produced and others within the Exhibit having an unknown origin (p. 37-38). This Exhibit contained \$180,000.00 in counterfeit \$10.00 bills, all of which had been seized from Joseph Cala and Barbara Morris in California (p. 88, 91-92); however, Barczak maintained that he only produced \$80,000 in counterfeit \$10.00 bills (p. 122). Mr. Barczak was shown a portion of government Exhibit No. 10 which were used negatives of a \$10.00 bill and indicated that these plates had not been run on his press nor used by him, although they were produced by him (p. 135-137).

Mr. Barczak further testified that he first met and spoke with James Gambacorta on approximately the 5th day of January, 1973 when Gambacorta was driving a limousine at Mr. Barczak's father's funeral (p. 126-27, 132); that Gambacorta then called him on January 11th, 1972 and asked him to come to Delaware Avenue and Avery Street with samples of the counterfeit currency to show a potential buyer (p. 132-33). Mr. Barczak was arrested at this meeting.

Mr. Robert Pochopin, a Secret Service agent, testified over the objection of the Defendant (p. 143, 147) as did James Gambacorta (p. 191-98).

Pochopin testified that on January 11th, 1973, he purchased 85 counterfeit \$10.00 bills from James Gambacorta (p. 143, 182); however, he indicated that only 80 of the 85 bills had the same source as the

\$180,000.00 comprising government Exhibit No. 1, which was seized from Joseph Cala and Barbara Morris in California (p. 183-84). Pochopin had no knowledge as to the source of the production of the remaining 5 bills (p. 189).

James Gambacorta related that in April or May of 1972, he received approximately \$200,000.00 in counterfeit \$10.00 bills from Joe Campana (p. 202) and identified government Exhibit No. 1 as being those bills (p. 203).

He first discussed counterfeit currency with Campana in the spring of 1971 and was asked by the Defendant if he could obtain the necessary paper (p. 204-05). Gambacorta obtained the paper in early 1972 (p. 203) from Joe Suppa in return for a promise to take care of him (p. 217). Gambacorta then gave the \$200,000.00 to Joseph Cala in California in July of 1972 (p. 209) but does not indicate whose idea this was other than his own. He retained \$1,000.00 of the counterfeit money (p. 210) for himself.

Gambacorta states that the first time he met Barczak was when he was working Barczak's father's funeral on January 6th, 1973 and that on that date he gave \$500.00 in counterfeit \$10.00 bills to Charles Saletta (p. 251). Gambacorta was arrested on January 11th, 1973 when he sold 85 \$10.00 bills to Pochopin (p. 143, 182) and stated that all of the 85 bills came from government Exhibit No. 1, the money he received from the Defendant. Gambacorta also indicated that government Exhibit No. 10 was taken from his possession at the time of his arrest (p. 246).

POINT I

Indictment No. 1973-303 should be declared a nullity and dismissed in that it is in direct violation of the Order of the Hon. Lloyd F. MacMahon, United States District Judge, on November 13th, 1974 under Indictment No. 1973-300.

Indictment No. 1973-300, wherein the Defendant was charged with conspiracy to produce and distribute counterfeit currency, a violation of Title 18 USC, Section 371, and possession of counterfeit currency in violation of Title 18 USC, Section 473, was ordered to trial on November 13th, 1974. Both the United States Attorney and the Defendant were present. The United States Attorney advised the Court that they were ready for trial (Appendix, p. 5). The Defendant also announced ready for trial and unsuccessfully attempted to reargue a motion to dismiss for a failure on the part of the United States Attorney to adequately comply with Defendant's Demand for a Bill of Particulars. After denying this motion, the Court ordered the matter to trial (Appendix, p. 9).

The government then moved to amend its Bill of Particulars and/or Indictment. The amendment sought was to change the time of the occurrence charged in Count 2 (possession of counterfeit currency) from in June, 1972 to the end of April or early May, 1972 (Appendix, p. 10). The Court denied this motion and precluded the United States Attorney from putting into evidence information different than that alleged in the Bill of Particulars (Appendix, p. 11). The court then granted the

government's motion for a continuance directing the United States Attorney to furnish particulars as previously ordered and apply for a clarification of prior orders, if necessary (Appendix, p. 13).

The government did not comply with this order. The government ignored this order and devised a procedure to avoid it. On November 14th, 1974, one day later, without any attempt at compliance with the order of the previous day, a superceding Indictment (No. 1974-303) was filed.

This Indictment (No. 1974-303) contained in Count 2 the changes the United States Attorney unsuccessfully sought to obtain in Court on November 13th, 1974. The superceding Indictment changed the time in Count 2 from "in June, 1972" to "on or about the end of May, 1972 or early June, 1972).

The Defendant, by motion filed December 19th, 1974 (Appendix, p. 15-18), moved to dismiss the superceding Indictment No. 1974-303 as being a nullity and void in that it was in direct violation of prior orders of the Court (Appendix, p. 4-14). The Hon. John T. Curtin, U.S. District Court Judge, denied this motion (Appendix, p. 22-24) indicating that "the procedure followed (by the) government does not violate Judge MacMahon's order". It is the contention of the Defendant that the government did violate Judge MacMahon's order of November 13th, 1974 (Appendix, p. 4-14) both in spirit and in fact.

The government did not seek clarification of prior orders of the Court as to what must be furnished in its Bill of Particulars

(Appendix, p. 13).

The government did not furnish additional particulars (Appendix, p. 13).

The government did not abide by, honor, execute or pay any attention whatsoever to the preclusion order of the Hon. Lloyd F. MacMahon of November 13th, 1974 (Appendix, p. 11).

In fact, the government totally ignored, forgot and avoided the proceedings of November 13th, 1974, treating those proceedings as though they never occurred.

There is no question but that the government has the right to dismiss an indictment without prejudice and seek a superceding indictment (Federal Rules of Criminal Procedure, 48 a.) but this must be done by leave of the Court (Rule 48 a., supra). The government, in the instant case, made no application to the Court but did it on its own initiative.

Rule 48 a. further provides that the government needs the Defendant's consent to do this at trial. How much closer to trial can a Defendant come then being ordered to proceed (Appendix, p. 9). The Defendant, on November 14th, 1974, was waiting for the government to comply with the Court's order of November 13th, 1974 (Appendix, p. 4-14), not anticipating a new indictment which would wipe out and destroy 14 months of expense and effort in preparing for trial.

If the government was dissatisfied with the Court's ruling of November 13th, 1974 and felt that it was detrimental to its chances

of obtaining a conviction, was not the proper remedy and the proper course of action to appeal from the Court's order of November 13th, 1974? Is this not what Appellate Courts exist for; to wit, to review the decisions of lower courts which the litigants feel are improper? Should not the government have exercised its rights and appealed from the order of November 13th, 1974 as it had the right to do under the Federal Rules of Appellate Procedure, 4 b. and 5 a.? The government did not appeal this ruling and thus waived its right to do so, tacitly accepting the propriety of the order of November 13th, 1974.

To allow the government to bring a defendant, after 14 months, to the brink of trial and decide to stop and start the proceedings over because they are suddenly dissatisfied with their prospects of success is obnoxious to all principles of justice. Can the executive branch of the government, in any litigation, avoid a detrimental court order merely by starting the action anew? To allow such conduct simply creates the situation whereby the government conducts itself by one set of rules and the defendant by another. A defendant could never say "stop, I'm not happy with the way this case is going - let's start over". Since the defendant must abide by established procedures, must not the government abide by established procedures as well?

This Indictment (No. 1974-303) should be dismissed and the conviction reversed in that the Indictment is null and void as being in direct violation of a prior court order and in direct violation of all established rules and procedures.

POINT II

The Defendant herein was denied the right to a speedy trial in violation of Rule 48 b. of the Federal Rules of Criminal Procedure.

Rule 48 b. of the Federal Rules of Criminal Procedure is controlling in the instant case. This Rule simply provides that "... If there is unnecessary delay in bringing a defendant to trial, the Court may dismiss the Indictment ...". The government has caused unnecessary delay in the bringing of this motion to trial. The trial of this action was delayed by the government from November 13th, 1974 to March 22nd, 1976, a total of 17 months. This delay was occasioned solely through the efforts of the government by the ignoring of the Court's order of November 13th, 1976, a matter which is discussed above.

Indictment No. 1974-303 contained not only different dates in Count 2, but alleged 12 overt acts in Count 1 as opposed to the 3 overt acts alleged in Count 1 of Indictment No. 1973-300. This compelled the Defendant to renew all discovery proceedings in order to try and obtain the particulars of the charges. It also resulted in the Defendant having to abandon 14 months of effort in defending against Indictment No. 1973-300. (See Appendix, p. 19-21)

POINT III

The proof of several conspiracies at trial with which the Defendant was not charged but which were similar in nature to the conspiracy with which the Defendant was charged created prejudicial error, compelling a reversal.

The Defendant herein was charged in Count 1 of the Indictment with conspiring with Edward Barczak (and only Edward Barczak) to produce and distribute counterfeit currency in violation of Title 18 USC, Section 471.

The proof on trial; however, was not limited to this one conspiracy. Two witnesses; to wit, James Gambacorta and Robert Pochopin, (Transcript, p. 143, 147, 191-98) testified to numerous conspiracies and crimes. All of these conspiracies and crimes appeared to revolve about the Defendant and Edward Barczak, but none of them involved both the Defendant and Edward Barczak nor directly established the overt acts alleged in Count 1; to wit:

- 1) James Gambacorta sold Robert Pochopin 85 counterfeit \$10.00 bills (p. 143, 182).

- 2) Robert Pochopin testified that 5 of the bills he purchased from Gambacorta were not from the bills Gambacorta received from Campana (p. 183-84, 203).

- 3) Barczak testified that he produced \$80,000.00 in counterfeit \$10.00 bills (p. 21) and Gambacorta testified that the

Defendant delivered \$200,000.00 in \$10.00 bills to him (p. 203). The Defendant was charged with dealing with a sum of \$80,000.00 in counterfeit \$10.00 bills, not \$200,000.00. To what conspiracy did the additional \$120,000.00 relate?

4) Gambacorta testified he was in possession of counterfeit plates and negatives at the time of his arrest (p. 246) which were supplied by the Defendant, plates and negatives which Barczak testified were used, but that he did not use them nor were they run on his press (p. 135-37) - a separate and distinct conspiracy.

5) Barczak testified that he went to meet Gambacorta on January 11th, 1973 to show a potential customer samples of the counterfeit currency (p. 132-33) - a separate and distinct conspiracy.

6) Gambacorta and Barczak agree that they met for the first time on or about the 6th day of January, 1973 (p. 126-27, 132, 251) and on January 6th, 1973 Gambacorta acknowledges he gave \$500.00 in counterfeit currency to Charles Saletta (p. 251) - another separate and distinct conspiracy.

7) Gambacorta testified that he discussed counterfeiting with the Defendant and obtained paper for him, but never indicated who else was involved (p. 204-5) other than one Joe Suppa (p. 201). Is this the conspiracy alleged in Count 1 to produce \$80,000.00 or a separate and distinct conspiracy to produce \$120,000.00?

8) James Gambacorta gave or sold \$200,000.00 to Joseph Cala in California (p. 209). What has this to do with Count 1?

9) Pochopin seized \$200,000.00 from Cala and Morris in California (p. 183), which is totally unrelated to Count 1, the Defendant and Edward Barczak.

In fact, nowhere within the testimony of Gambacorta or Pochopin can there be found anything which connects the Defendant to Edward Barczak nor which supports any of the overt acts alleged in Count 1 of the Indictment.

The 2nd Circuit Court of Appeals in U.S. v. Sperling, 506 F2d 1123 (2nd Cir. 1974) cautioned prosecutors not to charge one conspiracy when the proof will show several, which is exactly what occurred in the instant case.

The Court in U.S. v. Bertolotti, 529 F2d 149 (2nd Cir. 1975) reversed a conviction because of a failure to heed the admonitions of Sperling (supra). In Bertolotti there were 29 defendants and 31 unindicted co-conspirators and at least 4 separate conspiracies were proven. This created a prejudicial spill-over causing a transference of guilt from one defendant to another.

This prejudicial spill-over has occurred in the instant case. While there is only one defendant and one unindicted co-conspirator in the instant case, there were at least 8 separate and distinct conspiracies proven involving 8 different individuals as noted above; to wit:

- 1) Gambacorta and Pochopin
- 2) Gambacorta, the Defendant and an unnamed 3rd party
- 3) Gambacorta, the Defendant and an unnamed 3rd party

- 4) Gambacorta, Barczak and an unnamed 3rd party
- 5) Barczak and Gambacorta
- 6) Gambacorta, Barczak and Charles Saletta
- 7) Gambacorta, the Defendant and Joe Suppa
- 8) Gambacorta and Cala
- 9) Cala and Morris

The variance between the one conspiracy charged and the number of separate and distinct conspiracies proven created a prejudicial spill-over. No jury, when considering the proof presented against one man, should be allowed to hear so much testimony regarding other crimes which are in no way connected with the Defendant. It must be noted that neither Gambacorta nor Pochopin ever testified to a conspiracy or act that involved both the Defendant and Edward Barczak, nor did Barczak ever testify to an act involving himself, the Defendant and any of the other eight individuals named at trial.

It must be concluded that a preponderance of the evidence elicited at trial involved allegedly improper acts which were not before the Court. This created at trial an atmosphere of criminality which so inflamed and incensed the jury that the jury could only conclude that the Defendant was involved in something and thus should be convicted of something. Thus, prejudicial error was committed and a reversal should be had in the instant case.

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CONCLUSION

WHEREFORE, the Defendant requests this Court reverse the conviction under Count 1 of the Indictment and dismiss same in that the Indictment is null and void as being in direct violation of the November 13th, 1974 order of the Hon. Lloyd F. MacMahon, or reverse the conviction under Count 1 of the Indictment and dismiss the Indictment in that the Defendant had been denied the right to a speedy trial as provided for in the Federal Rules of Criminal Procedure (48 b.) or, reverse the conviction under Count 1 of the Indictment and order a new trial based upon the prejudicial error which occurred through the admission of the testimony of Robert Pochopin and James Gambacorta over the Defendant's objection.